

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY M. RICE,

Defendant-Appellant.

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UNPUBLISHED

October 7, 2003

No. 225865

Wayne Circuit Court

LC No. 99-002073

ON REMAND

Before: Murphy, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

We previously affirmed defendant's jury trial convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. *People v Rice*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2002 (Docket No. 225865). We again affirm defendant's convictions. The Michigan Supreme Court, in lieu of granting leave to appeal, stated that it was vacating that portion of our prior opinion concerning defendant's peremptory-challenge issue raised under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Our Supreme Court ruled:

The trial transcript indicates that the trial judge was not satisfied with the prosecutor's race neutral reasons for peremptorily dismissing several jurors. [Tr at 95]. However, the Court of Appeals based its judgment on the premise that the trial court rejected the *Batson* challenge and, in doing so, the Court of Appeals also appears to have failed to follow *Miller-El v Cockrell*, 537 US 322 (2003)(holding that evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within the trial judge's province). For these reasons, the case is remanded to the Court of Appeals for reconsideration of whether the trial judge erred in finding a *Batson* violation. If the Court finds that the trial court did not err, the Court is to address whether the trial court was correct in ruling that the racial composition of the final jury cured any *Batson* violation that was not cured due to the failure to reseal the peremptorily dismissed jurors. [468 Mich 919-920 (2003).]

We initially note that our prior opinion in this case never contained a discussion regarding a peremptory challenge issue or *Batson* because the issue was never raised by defendant.

We have reviewed the transcript reference cited by the Supreme Court, which shows, according to the Supreme Court, that the trial judge was not satisfied with the prosecutor's race neutral reasons for peremptorily dismissing "several" jurors. The transcript reveals that the trial court was not satisfied with the prosecutor's reasons with respect to two prospective jurors, venirepersons number 2 and 9. In regard to venireperson #9, there was never an objection by defense counsel when the prosecutor exercised her peremptory challenge, and venireperson #9 left the courtroom. In regard to venireperson #2, defense counsel did raise a *Batson* challenge immediately upon the prosecutor's exercise of a peremptory challenge. The jury pool was taken out of the courtroom while the parties addressed the *Batson* challenge. During this time period, venireperson #2, apparently under the belief that she had definitively been discharged, left the building. While the trial court was dealing with the issue and arguments concerning venireperson #2, it also stated that it had been concerned about the prosecutor's peremptory challenge of venireperson #9; however, the court did not say anything at the time of the challenge because there had been no objection. The prosecutor proceeded to give a reason for discharging venireperson #9. The trial court was not satisfied with the prosecutor's claimed race-neutral explanations as to both prospective jurors, but the court noted that they had already left the building.

The trial court indicated that it should have held the two prospective jurors. However, the court also stated that it did not think the problem was serious enough at that point in the proceedings. We note that the trial court did not make a specific finding that the prosecutor had engaged in purposeful discrimination.<sup>1</sup> In fact, at the end of jury selection, the trial court stated that "I don't think either side ended up selecting this panel for any reason other than I think that these are the ones who will be the fair and impartial persons to hear and try this case." The trial court also indicated that "any *Batson* problems that *may* have" occurred were cured in light of the ultimate racial composition of the jury. The trial court noted that "[w]e have the same number if not more jurors, African American female jurors[,] on the panel as if we had kept [the two prospective jurors]."

Our Supreme Court has ordered us to reconsider "whether the trial judge erred in finding a *Batson* violation." We are somewhat puzzled by this language in that, as noted above, there

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<sup>1</sup> In *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319; 553 NW2d 377 (1996), this Court stated:

Plaintiffs next claim that defendant improperly used its peremptory challenges to remove all the black jurors from the panel. *Edmonson v Leesville Concrete Co*, 500 US 614; 111 S Ct 2077; 114 L Ed 2d 660 (1991). *Batson v Kentucky*, *supra*, sets forth a three-step process for evaluating such claims: (1) the complaining litigant must make a prima facie showing of discrimination, (2) the burden then shifts to the party exercising the peremptory challenge to articulate a race-neutral rationale for striking the juror at issue, and then (3) the court must determine whether the complaining litigant carried the burden of proving "purposeful discrimination." See *People v Barker*, 179 Mich App 702, 705-706; 446 NW2d 549 (1989), *aff'd* 437 Mich 161; 468 NW2d 492 (1991).

was no specific finding of a *Batson* violation. Because the two prospective jurors had already left the courthouse, the trial court apparently found no reason to directly address whether there was purposeful discrimination. Nonetheless, we shall endeavor to follow the Supreme Court's order as written. As such, we are required to begin with the assumption that the trial court found a *Batson* violation, and arguably, a finding of purposeful discrimination is implicit in the trial court's indication of its dissatisfaction with the prosecutor's race-neutral explanations.

An appellate court must give great deference to the trial court's findings on a *Batson* issue because they turn in large part on credibility. *Harville v State Plumbing & Heating, Inc.*, 218 Mich App 302, 319-320; 553 NW2d 377 (1996). The decision on the ultimate question of discriminatory intent represents a finding of fact accorded great deference on appeal, which will not be overturned unless clearly erroneous. *Miller-El v Cockrell*, 537 US 322; 123 S Ct 1029; 154 L Ed 2d 931, 951-952 (2003).<sup>2</sup> Nonetheless, we find that the trial court clearly erred and abused its discretion in finding a *Batson* violation. Assuming that defendant made a prima facie showing that the peremptory challenges had been exercised on the basis of race, and after the prosecutor proffered race-neutral explanations, the trial court was required to determine whether defendant had shown purposeful discrimination. *Miller-El, supra*.<sup>3</sup> We must accept the trial court's rejection of the prosecutor's race-neutral explanations as a finding of purposeful discrimination. However, that implicit finding of purposeful discrimination directly conflicts with the trial court's belief, clearly stated on the record, that the attorneys for all parties selected a jury motivated solely by the desire to have fair and impartial persons hear the case. The trial court's own language cannot support a finding of purposeful discrimination. Moreover, there were valid race-neutral reasons articulated by the prosecutor justifying the peremptory challenges of venirepersons #2 and #9. Venireperson #9 was very familiar with the circumstances surrounding a first cousin's arrest and conviction on a drug charge, and venireperson #2 "hoped" she would not compare the victim to her own daughter who was about the same age as the victim. See *People v Howard*, 226 Mich App 528, 534-535; 575 NW2d 16 (1997)(criminal conviction of a close relative, an uncle, was a proper race-neutral reason for peremptory challenge; life circumstances of venireperson comparable to the particular factual circumstances found in the criminal case can justify a peremptory challenge). Therefore, although we give great deference to the trial court's findings on a *Batson* issue, the record does not support a conclusion of purposeful discrimination, and the court erred in finding a *Batson* violation.

Affirmed.

/s/ William B. Murphy  
/s/ Joel P. Hoekstra  
/s/ Jane E. Markey

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<sup>2</sup> We note that this Court in *Harville, supra* at 320, stated that "[w]e review trial court rulings regarding *Batson* challenges for an abuse of discretion."

<sup>3</sup> In resolving whether there exists purposeful discrimination, a trial court must determine whether the prosecutor's race-neutral explanation was merely a pretext. *Miller-El, supra*.